Supreme Court, U.S.
FILED
JAN 22 1998
CLERK

No. 97-765

In The

Supreme Court of the United States

October Term, 1997

MARY ANNA GNADT,

Petitioner,

vs.

ERNEST G. CASTRO and CASTRO FAMILY, INC. t/a MAMA'S ITALIAN RESTAURANT and TINO'S SPORTS LOUNGE,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

GREGORY BECKWITH
Counsel of Record
PHILLIPS, BECKWITH & HALL
Attorneys for Respondents
10513 Judicial Drive
Suite 100
Fairfax, Virginia 22030
(703) 691-4100

144295

(800) 274-3321 • (800) 359-6859
A DIVISION OF COUNSEL PRESS

Lutz Appellate Services, inc.

39pp

QUESTIONS PRESENTED FOR REVIEW

1. Whether the district court erred in entering judgment for the Respondents on the Petitioner's retaliation claim pursuant to Rule 52(c) of the Federal Rules of Civil Procedure having found that the Petitioner failed to demonstrate any harm to or effect on herself from a Respondent's post employment telephone messages?

2. Whether anti-retaliation protections exist absent proof that the retaliation results in discharge from a later job, refusal to hire or other professional or occupational harm?

3. Are nominal damages appropriate where the Petitioner is unable to prove the telephone calls of the employer had any effect at all on her?

4. Whether a former employer's alleged threats of adverse action alone, without any effect on the employee, can constitute a basis for a Title VII retaliation claim given the appellate court's refusal to address the issue as unnecessary?

PARTIES TO THE PROCEEDING

1. Mary Anna Gnadt (hereinafter referred to as "Gnadt"), Plaintiff in the District Court and Petitioner in these proceedings.

2. Ernest G. Castro (hereinafter referred to as "Castro"); Castro Family, Inc., t/a Mama's Italian Restaurant and Tino's Sports Lounge (hereinafter referred to as "Tino's"), Defendants in the District Court and Respondents in these proceedings.[1]

---

1. Pursuant to Rule 29 of the Rules of Supreme Court of the United States, Ernest G. Castro and Castro Family, Inc., the Respondents, make the following disclosure:

1. Respondents are not publicly held corporations or other publicly held entities.

2. Respondents are not a parent, subsidiary or affiliate of, or a traded association representing, a publicly held corporation or other publicly held entity.

3. No publicly held corporations or entities have a direct financial interest in the outcome of this litigation.

TABLE OF CONTENTS

	Page
Questions Presented for Review	i
Parties to the Proceeding	ii
Table of Contents	iii
Table of Citations	v
Citation of Opinions	1
Jurisdictional Statement	1
Applicable Statute	1
Statement of the Case	2
A. Procedural History	2
B. Factual Summary	4
1. Employment History	4
2. Post Employment Activities	6
Misstatement of Fact	7
Summary of the Argument	8
Reasons for Denying the Writ	9

Contents

Page

I. The District Court Did Not Err In Entering Judgment For The Respondents On Petitioner's Retaliation Claim Pursuant To Rule 52(c) Of The Federal Rules Of Civil Procedure Having Found That The Petitioner Failed To Demonstrate Any Harm To Or Effect On Herself From The Respondent's Telephone Calls. 9

A. The district court's factual findings shall not be disturbed unless clearly erroneous. 9

B. The district court did not err in entering judgment for the Respondents on Petitioner's retaliation claim, having found that the Respondents did not interfere with any prospective business, education, or other opportunities of the Petitioner. 11

II. Anti-retaliation Protections Do Not Exist When The Retaliation Does Not Result In Discharge From A Later Job, Refusal To Hire, Or Other Professional Or Occupational Harm. 14

III. Nominal Damages Are Not Appropriate Where The Petitioner Is Unable To Prove Liability Or Injury. 15

IV. An Employer's Alleged Threats Alone, Which The Employee Is Unable To Prove Had Any Effect At All On Her, Does Not Constitute A Basis For A Title VII Retaliation Claim. 17

Conclusion 19

Contents

Page

TABLE OF CITATIONS

Cases Cited:

Atkinson v. Oliver T. Carr Co., 40 FEP cases (BNA) 1041 (D.D.C. 1986) 18

Baker v. U.S. Dep't of the Interior Board of Mine Operations Appeals, 595 F.2d 746 (D.C. Cir. 1978) 18

Bailey v. USX Corp., 850 F.2d 1506 (11th Cir. 1988) 14

Bohen v. City of East Chicago, Indiana, 622 F. Supp. 1234 (D.C. Ind. 1985) 16, 17

Charlton v. Paramus Board of Education, 25 F.3d 194 (3rd Cir. 1994) 14

Dunlop v. Carriage Carpet Shop, 548 F.2d 139 (6th Cir. 1977) 15

Eastern Assoc. Coal v. Fed. Mine S. & H. Rev. Com'n, 813 F.2d 639 (4th Cir. 1987) 18

E.E.O.C. v. Cosmair, Inc., 821 F.2d 1085 (5th Cir. 1987) 15

Evans v. Davey Truckers, Inc., 769 F.2d 1012 (4th Cir. 1985) 12

Contents

Page

Fahie v. New York City Department of Corrections, 737 F. Supp. 15 (S.D.N.Y. 1990) 12

Ford v. Alfaro, 785 F.2d 835 (9th Cir. 1986) 18

Garcia v. Lawn, 805 F.2d 1400 (9th Cir. 1986) 18

Hicks v. United States, 368 F.2d 626 (4th Cir. 1966) . 11

Holt v. Continental Group, 708 F.2d 87 (2nd Cir. 1983), *cert denied*, 465 U.S. 1030 (1984) 18

McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973) 11

McKnight v. General Motors Corp., 908 F.2d 104 (7th Cir. 1990) 18

NLRB v. Overseas Motor, Inc., 721 F.2d 570 (6th Cir. 1983) 18

O'Brien v. Sky Chefs, Inc., 670 F.2d 864 (9th Cir. 1982) 14

Pantchenko v. C.B. Dolge Company, Inc., 581 F.2d 1052 (2nd Cir. 1978) 14

Passer v. American Chemical Society, 935 F.2d 322 (D.C. Cir. 1991) 14

Robinson v. Shell Oil Co., 117 S. Ct. 843 (1997) ... 3, 10, 14

Contents

Page

Ross v. Communication Satellite Corp., 759 F.2d 355 (4th Cir. 1985) 11, 12

Rutherford v. American Bank of Commerce, 565 F.2d 1162 (10th Cir. 1977) 15

Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 101 S. Ct. 1089, 67 L. Ed. 2d 207 (1981) 11

Statutes Cited:

28 U.S.C. § 1254(1) 1

42 U.S.C. § 2000e-3(a) 1, 12, 14

Rules Cited:

Federal Rule of Civil Procedure 52(a) 10

Federal Rule of Civil Procedure 52(c) ..... i, 2, 8, 9, 10

Supreme Court Rule 10 9

Supreme Court Rule 15(2) 7

Contents

Page

APPENDIX

Appendix A — Opinion of the United States Court of Appeals for the Fourth Circuit Decided July 10, 1997 ..... 1a

Appendix B — Order of the United States Court of Appeals for the Fourth Circuit Denying Petition for Rehearing Filed August 5, 1997 ..... 9a

Respondents request that the Court deny the Petition for Writ of Certiorari seeking review of an opinion of the United States Court of Appeals for the Fourth Circuit.

Title VII § 704(a) of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-3(a), declares it to be an unlawful employment practice for an employer to discriminate against "any of his employees or applicants for employment" because he has made a charge under Title VII. The issue in need of resolution is whether the district court erred in entering judgment for the Respondents on Petitioner's retaliation claim having found the evidence insufficient to prove *any* injury to the Petitioner.

CITATION OF OPINIONS

The Opinion of the United States Court of Appeals for the Fourth Circuit, entered on July 10, 1997, is unpublished. A copy is reprinted in the Appendix to the Petition for Writ of Certiorari. (App. A.1-A.8). An order denying Gnadt's Petition for Rehearing or Rehearing En Banc was issued by the Court of Appeals on August 5, 1997. (A.9).

The Opinion of the United States District Court for the Eastern District of Virginia, entered on January 18, 1995, is found within the trial transcript (Jt. App., Vol. II, pp. 208-215).

JURISDICTIONAL STATEMENT

The Supreme Court has jurisdiction to consider the Petition for Writ of Certiorari pursuant to 28 U.S.C. § 1254(1).

APPLICABLE STATUTE

This case involves the proper interpretation of a federal statute, Section 704(a) of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-3(a):

> It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

STATEMENT OF THE CASE

A. Procedural History

The complaint in this case was filed in the United States District Court for the Eastern District of Virginia on the 8th day of July, 1994, alleging counts of gender discrimination, constructive discharge, retaliation, and intentional infliction of emotional distress. The district court, District Judge Leonie M. Brinkema presiding, conducted a bench trial on January 18, 1995. At the close of Gnadt's presentation of evidence, Respondents moved for judgment as a matter of law under Federal Rule of Civil Procedure 52(c) on all claims. The district court granted the motion *in toto*. Gnadt filed a notice of appeal on February 13, 1995, appealing only the gender discrimination and retaliation counts. The appeal was docketed in the United States Court of Appeals for the Fourth Circuit on March 10, 1995.

On March 12, 1996, a panel of the United States Court of Appeals for the Fourth Circuit issued an unpublished opinion

affirming the district court's entry of judgment with respect to Gnadt's post employment retaliation claim and remanded the discrimination claim to allow Respondents to articulate a legitimate non-discriminatory reason for the lateral shift change of the Petitioner.

On May 7, 1996, further proceedings were held in the district court. After Respondents' presentation of additional evidence, the court again dismissed the Petitioner's gender discrimination claim, finding that the employer had a legitimate non-discriminatory reason for the lateral transfer of the Petitioner's job assignments. The judgment order was entered on May 10, 1996 and no appeal of that judgment was noted.

On June 7, 1996 Gnadt petitioned the United States Supreme Court for a writ of certiorari to review the judgment on her retaliation claim. Upon granting Gnadt's petition, by order entered February 24, 1997, the Supreme Court vacated the United States Court of Appeals for this Fourth Circuit's judgment and remanded the case for further consideration in light of the Court's opinion in *Robinson v. Shell Oil Co.*, 117 S. Ct. 843 (1997).

The court of appeals entered its judgment on July 10, 1997 on remand from this Court. (A.1-A.8). The United States Court of Appeals for the Fourth Circuit held that the district court, by necessity, found that Gnadt failed to prove any injury from Castro's alleged retaliatory conduct. An order denying Gnadt's petition for rehearing or rehearing en banc was issued by the court of appeals on August 5, 1997. (A.9). The present petition was filed with this Court on November 3, 1997.

B. Factual Summary

1. Employment History

In January, 1992 the Petitioner commenced her employment as a waitress with Castro Family, Inc., the corporate owner of Mama's Italian Restaurant and Tino's Sports Lounge. Prior to her employment with Castro Family, Inc. the Petitioner had never been employed as a bartender. In 1992 the Petitioner worked 60 percent of her hours as a bartender and 40 percent as a waitress. In 1993 the Petitioner's hours were split equally between bartending and waitressing (Jt. App., Vol. II, p. 140).[2] The Petitioner admits that it is not degrading to work as a waitress. During the Summer of 1993, the Petitioner, a law student, pursued employment in the legal profession and felt the necessity to clerk additional hours with her secondary employer, a law firm. (Jt. App., Vol. II, p. 71). The Petitioner reduced her hours of employment with Tino's by yielding one of her shifts to another employee.

As summer came to an end and as football season approached, the Petitioner requested that she be allowed to work Sunday days and an additional shift. (Jt. App., Vol. II, p. 35). Castro assigned Gnadt to the Sunday day shift and the Tuesday evening shift commencing August, 1993. Due to a conflict with Gnadt's school schedule she switched her Tuesday night shift with the Monday night shift held by another employee, Jennifer Cohn. Cohn had worked as a bartender on Monday nights, while the Petitioner had worked as a cocktail waitress on Tuesday nights.

---

2. Citations to the joint appendix are for the convenience of the Court should it request transmittal of the document from the clerk of the court of appeals.

In late August, 1993 a meeting was held at the restaurant. (Jt. App., Vol II, p. 78). In attendance at the meeting were management and wait staff. As a result of members of the wait staff leaving the Commonwealth of Virginia for college and other professional and employment opportunities, the need for additional personnel during peak hours of the restaurant was discussed. (Jt. App. Vol. II, pp. 79-83). Management decided to place an advertisement in the newspaper to hire additional bar and wait staff. Two additional bartenders were hired, Suzanne Gonzales (female), and Michael Devine (male).

In an attempt to integrate Devine and Gonzales into staff rotation, Devine was assigned to work Monday evenings as a bartender. Gnadt's Monday night shift was rescheduled to Friday night. Gnadt admits that management decides how to integrate new hires and determines shift schedules. Gnadt admits she never spoke to Devine about his shift assignments. Gnadt admits she does not know whether or not the shift assignments were to accommodate Devine's conflicts with other work commitments. A witness, Diane Fallon, called on behalf of Gnadt, admitted that Castro informed Gnadt why he had hired Devine and "juggled" the schedule. (Jt. App., Vol. II, p. 184).

The notice of the scheduling change was communicated to Gnadt on October 15, 1993. (Jt. App., Vol. II, p. 42). Gnadt, upset at her shift change, simply failed to show up for her scheduled Sunday day shift on October 17, 1993. Gnadt admits that she resigned on October 17, 1993. (Jt. App., Vol. II, p. 129). On October 17, 1993 Gnadt communicated to Castro, after her non-appearance, that she was resigning. Castro responded that he did not fire Gnadt, that he did not consider Gnadt's transfer a demotion, and that Gnadt would not experience a pay cut. Castro told Gnadt he did not want her to quit. (Jt. App., Vol. II, pp. 153-155).

2. Post Employment Activities

On or about December 2, 1993, after Gnadt had resigned, Castro called the home of a mutual acquaintance where Gnadt was house sitting and left a message on the telephone recorder.[3] Notwithstanding the message, Gnadt admits that she has no knowledge of any communication from Castro to any third party of the fact that an EEOC complaint was filed. Gnadt admits that she has no knowledge of any communication made by Castro to any prospective employer. Gnadt testified that she had no knowledge of any attempts by Castro to obstruct her ability to obtain employment. (Jt. App., Vol. II, p. 16). Gnadt admits that Castro did not threaten her physically or use vulgarity towards her. Gnadt admits that she interpreted the recorded telephone message to mean that Castro felt that he would prevail in litigation and "beat me down to a pulp in a court of law". (Jt. App., Vol. II, p. 164).

Following her resignation, Gnadt admits she successfully completed her law school studies, obtaining a cumulative G.P.A. in excess of 3.0. Gnadt admits that she continued clerking at the law firm of Martinez & Sandoval, P.C. (Jt. App., Vol. II, pp. 166, 167). Gnadt admits she obtained substantially similar employment at two restaurants, Bravo's and Applebee's. Gnadt admits that she successfully studied for and passed the bar exam in July, 1994. Gnadt admits she pursued her L.L.M. at Georgetown University.

After the recorded telephone message, Castro made no further attempts to contact Gnadt. (Jt. App., Vol. II, p. 61). The Petitioner was not deterred from seeking employment in the legal profession as she continued to search for employment. (Jt. App., Vol. II, p. 61).

---

3. The text of the recorded message can be found on pages 59 and 60 of Volume II of the Joint Appendix.

MISSTATEMENT OF FACT

Pursuant to Rule 15(2) of the Rules of the Supreme Court of the United States, the Respondent should address any perceived misstatement of fact or law that bears on issues properly before the Court.

Counsel for the Petitioner admitted at trial that the only evidence of retaliatory conduct were the phone message to Gnadt on December 2, 1993, and the phone call to Mooradian on December 6, 1993. (Jt. App., Vol. II, p.204). Mooradian's testimony regarding Gnadt's emotional state as set forth on page 4 of Petitioner's brief occurred in the later part of October-November, 1993. Mooradian testified that, "[i]n late October into November time period I notice she became quite distracted, and her performance was not to the standard that it had been previously." (Jt. App., Vol. II, p. 100). This behavioral change was observed *before* the alleged occurrence of the retaliatory conduct on December 3, and 6, 1993. (emphasis added). In fact, Petitioner didn't file her charge of discrimination with the Fairfax County Human Rights Commission until November 12, 1993. The notice of the charge of discrimination was not mailed to Castro until November 24, 1993. Moordian testified, and the district court and court of appeals found, that Gnadt's decline in performance could be due to other unrelated factors. (Jt. App., Vol. II, p. 101; A.4).

Gnadt testified that she did not consider the tape recorded message as a physical threat. Gnadt testified that her perception of the tape recorded message was that Castro believed he would prevail in court. (Jt. App., Vol. II, pp. 164, 165). As the court of appeals found, Gnadt did not list a single activity of any kind that she was unable to perform as a result of Castro's telephone calls. (A.5).

SUMMARY OF THE ARGUMENT

The district court did not err in entering judgment for the Respondents on Petitioner's retaliation claim, having found that the Petitioner failed to demonstrate any harm to or effect on herself from Castro's telephone messages. *See* Federal Rules Civil Procedure 52(c). The Petitioner failed to demonstrate that an adverse employment action disadvantaging her occurred. The anti-retaliation protections exist only when the retaliation results in a discharge from a later job, refusal to hire, or other professional or occupational harm.

Nominal damages are not something a court awards just to keep a case alive. The court should not use nominal damages as "heartbalm" when Gnadt failed to establish any injury or effect on herself from Castro's telephone calls. Lastly, a former employer's alleged threats alone, without any effect on the employee, cannot constitute a basis for a Title VII retaliation claim. This is especially true when the appellate court held the issue was not properly before it.

REASONS FOR DENYING THE WRIT

I.

THE DISTRICT COURT DID NOT ERR IN ENTERING JUDGMENT FOR THE RESPONDENTS ON PETITIONER'S RETALIATION CLAIM PURSUANT TO RULE 52(c) OF THE FEDERAL RULES OF CIVIL PROCEDURE HAVING FOUND THAT THE PETITIONER FAILED TO DEMONSTRATE ANY HARM TO OR EFFECT ON HERSELF FROM THE RESPONDENT'S TELEPHONE CALLS.

A. The district court's factual findings shall not be disturbed unless clearly erroneous.

Rule 10 of the Rules of the Supreme Court of the United States states:

> Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons.
>
> * * *
>
> A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.

The district court granted the Respondents' judgment as a matter of law on all four counts at the conclusion of the Petitioner's case. In ruling on the retaliation claim, the court assumed that a former employee, like Gnadt, could bring a

retaliation claim under Title VII against a former employer in accordance with this Court's ruling in *Robinson v. Shell Oil Co.*, 117 S. Ct. 843 (1997) (holding that "employees" under Title VII includes former employees).

The district court having found no legal or factual basis to support any of the Petitioner's claims, granted the Respondents' motion for judgment as a matter of law on all counts, pursuant to Rule 52(c) of the Federal Rules of Civil Procedure. (Jt. App. Vol. II, p. 213).

Rule 52(c) provides:

> If during a trial without a jury, a party has been fully heard on an issue and a court finds against the party on that issue, the court may enter judgment as a matter of law against the party with respect to a claim or defense that cannot, under the controlling law, be maintained or defeated without a favorable finding on that issue, or the court may decline to render any judgment until the close of all the evidence. Such a judgment shall be supported by findings of facts and conclusions of law as required by subdivision (a) of the Rule.

At the close of the Petitioner's case the district court issued its findings of fact and conclusions from the bench. Pursuant to Rule 52(a) of the Federal Rules of Civil Procedure findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the district court to judge the credibility of the witnesses. The district court made factual findings that there existed no evidence that the (Respondents) interfered with any prospective employment, business, educational, or other activities of the Petitioner. The district

court's findings on the evidence shall not be disturbed by the appellate court unless clearly erroneous. Where the weight of the evidence and the veracity of the witnesses are in issue, the decision is for the judge who has had the opportunity to see and evaluate the documentary evidence and witnesses demeanor. *Hicks v. United States*, 368 F.2d 626 (4th Cir. 1966). Although carefully couched in policy considerations the Petitioner's argument hinges upon what she perceives as an erroneous factual finding. Petitions are rarely granted on this basis.

This Court should deny review because "[on] this record it would be impossible to find that Gnadt proved any reasonable harm to or even effect on her resulting from Castro's threat." (A.7).

B. The district court did not err in entering judgment for the Respondents on Petitioner's retaliation claim, having found that the Respondents did not interfere with any prospective business, education, or other opportunities of the Petitioner.

Ross v. Communication Satellite Corp., 759 F.2d 355 (4th Cir. 1985), established a test for determining whether an employee has established a prima facie case of retaliation.[4] *Ross* in relying on the sequence of proof and burdens prescribed by *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-05, 93 S. Ct. 1817, 1824-25, 36 L. Ed. 2d 668 (1973), and *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 252-56, 101 S. Ct. 1089, 1093-95, 67 L. Ed. 2d 207 (1981), held that a *prima facie* case of retaliation consists of three (3) elements:

---

4. *Ross* did not address retaliation against a former employee.

(1) the employee engaged in a protected activity;

(2) the employer took adverse action against the employee; and

(3) a causal connection exists between the protected activity and the adverse action.

Id. 759 F.2d at 365.

In *Fahie v. New York City Department of Corrections*, 737 F. Supp. 15 (S.D.N.Y. 1990), the court, in granting the defendant's motion for summary judgment, held that to make out a *prima facie* case under section 704(a) of Title VII (42 U.S.C. § 2000(e)-3(a), the plaintiff must show that he engaged in an activity protected under Title VII, that his activity was known by the alleged retaliator, *that an adverse employment action disadvantaging him occurred*, and that a causal connection exists between his participation in the protected activity and the adverse employment action. (emphasis added).

In *Evans v. Davey Truckers, Inc.*, 769 F.2d 1012 (4th Cir. 1985), the employee (like the Petitioner), voluntarily resigned his employment and therefore suffered no adverse employment action at the hands of the employer.

In the case at bar the Respondents exercised no control over the Petitioner after her voluntary resignation on October 17, 1993. The district court correctly found that the Petitioner failed to produce any evidence that the Respondents interfered with any opportunities of the former employee. (Jt. App., Vol. II, p. 213). The district court's factual determination that the Petitioner suffered no injury was clearly not erroneous. The district court found, through the Petitioner's own admissions, that there was,

> [n]o evidence whatsoever that any phone calls or contacts, or any actions, had been taken by the Defendant to in any way interfere with prospective business, educational, or other kinds of activities. Therefore, I find *no factual basis* to support the Petitioner's case on the retaliation issue.

(Jt. App., Vol. II, p. 213) (emphasis added).

In this case, the Petitioner testified that she had no further contacts with her employer after having received possession of a recorded message left at the house of a third party. She admitted she continued to interview for employment in the legal profession. The Petitioner admitted that there exists no evidence that the Respondents in any way interfered with her applications for employment. The Petitioner admitted that she has no knowledge of any communication by the Respondents with any prospective employers. The Petitioner admitted she has no evidence that Castro has defamed her to any third party. The Petitioner admitted to having successfully maintained her legal clerkship. The Petitioner admitted she successfully completed her law school studies, obtaining a cumulative G.P.A. in excess of 3.0. The Petitioner admitted to having secured two (2) other similarly situated waitressing and bartending positions at Bravo's and Applebee's. Gnadt admitted she successfully studied for and passed the bar exam in July, 1994. Petitioner further admitted pursuing her L.L.M. at Georgetown University. In fact, the Petitioner can point to no fact that suggests that there was ever a causal connection between the recorded message and *any* adverse impact upon employment, business, educational, or other opportunities.

II.

ANTI-RETALIATION PROTECTIONS DO NOT EXIST WHEN THE RETALIATION DOES NOT RESULT IN DISCHARGE FROM A LATER JOB, REFUSAL TO HIRE, OR OTHER PROFESSIONAL OR OCCUPATIONAL HARM.

The Supreme Court in *Robinson v. Shell Oil Company*, 117 S. Ct. 843 (1997) has construed § 704(a) to protect employees against acts of post- employment retaliation by their past employers arising out of and related to their former employment. *Robinson* and the other courts that have extended anti-retaliation protection to include former employees have done so when retaliation results in discharge from a later job, refusal to hire, or other professional or occupational harm. *See, e.g., Robinson v. Shell Oil Company*, 117 S. Ct. 843 (1997) (employee claimed that employer gave him a negative reference to a prospective employer in retaliation for having filed an EEOC claim); *Passer v. American Chemical Society*, 935 F.2d 322, 331 (D.C. Cir. 1991), (employer deprived former employee of "rare and prestigious" professional laurel and retaliation for filing discrimination claim); *Charlton v. Paramus Board of Education*, 25 F.3d 194 (3rd Cir. 1994) (school district alleged to have revived state proceedings for revocation of teacher's teaching certificate in retaliation for her decision to continue pursuing a Title VII action challenging her termination as discriminatory); *Bailey v. USX Corp.*, 850 F.2d 1506 (11th Cir. 1988) (former employer made adverse comment to prospective employer in retaliation for former employee's previous sex discrimination suit); *O'Brien v. Sky Chefs, Inc.*, 670 F.2d 864 (9th Cir. 1982) (former employer refused to rehire and gave bad recommendations after termination and filing of the EEOC charges); *Pantchenko v. C.B. Dolge Company, Inc.*, 581 F.2d 1052 (2nd Cir. 1978) (employer's refusal to furnish

letters of recommendation in retaliation for the Petitioners having filed discrimination charges with the EEOC); *Rutherford v. American Bank of Commerce*, 565 F.2d 1162 (10th Cir. 1977) (former employee advised a prospective employer of fact that employee had filed a sex discrimination charge); *E.E.O.C. v. Cosmair, Inc.*, 821 F.2d 1085 (5th Cir. 1987) (employer discontinued employee's severance pay because he had filed charge); *Dunlop v. Carriage Carpet Shop*, 548 F.2d 139 (6th Cir. 1977) (employer informed a prospective employee of the fact that former employee had filed a complaint with the Department of Labor).

The Petitioner, in the case at bar, was not discharged from a later job. The Petitioner was not given a negative employment reference. The Petitioner was not refused employment with a prospective employer for filing a claim. The Petitioner admits that she has no knowledge of suffering any professional or occupational harm. The district court's factual findings suggest that there is no evidence whatsoever that any actions taken by the Respondents in any way interfered with the prospective business, educational, or any other activities of the Petitioner. (Jt. App., Vol. II, p. 213) The court stated "I find no *factual* basis to support the Petitioner's case on the retaliation issue." (Jt. App., Vol. II, p. 213). Accordingly the petition should be denied.

III.

NOMINAL DAMAGES ARE NOT APPROPRIATE WHERE THE PETITIONER IS UNABLE TO PROVE LIABILITY OR INJURY.

In this second petition for writ of certiorari, the Petitioner raises for the first time her request for the award of nominal damages. This is a transparent attempt to collect attorneys fees

— nothing more, nothing less. The Petitioner states that nominal damages are traditionally awarded in the case in which compensatory relief is available, where liability has been established, but where the Plaintiff has not established the degree of injury necessary to support an award of compensatory damages. (Brief at p. 7). The Petitioner fails to acknowledge the district and appellate courts' findings that Gnadt failed to prove any injury or harm. (A.6, 7).

The district court found, and the court of appeals affirmed, that Gnadt failed to demonstrate any harm to or even effect on herself from Castro's threat. As the court of appeals stated:

> In view of the well supported factual finding, the only appellate argument available to Gnadt is that an employer's threats alone, which the employee is unable to prove had *any effect at all on her*, can constitute a basis for a Title VII retaliation claim. Neither EEOC nor Gnadt has cited any case so holding and we have found none. It is difficult to envision such a case in view of the fact that Title VII, as amended in 1991, permits an award of compensatory damages only for future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other non-pecuniary losses; 42 U.S.C. § 1981a(b)(3), *not for no loss at all.*

(A.7, 8) (emphasis added).

As the court stated in *Bohen v. City of East Chicago, Indiana*, 622 F. Supp. 1234 (D.C. Ind. 1985), (denying plaintiff any recovery whether or not there was a violation):

> [n]ominal damages are not something a court awards just to keep a case alive. A judge who lacks the power to award substantial damages may not use nominal damages as heartbalm. The reasons that block an award of actual damages also block an award of nominal damages.

Id. at 1246.

This Petitioner has demonstrated no damages at all. Absent an abuse of discretion, the decision of the trial court (upheld by the appellate court) not to award damages, including nominal damages, shall not be disturbed.

IV.

AN EMPLOYER'S ALLEGED THREATS ALONE, WHICH THE EMPLOYEE IS UNABLE TO PROVE HAD ANY EFFECT AT ALL ON HER, DOES NOT CONSTITUTE A BASIS FOR A TITLE VII RETALIATION CLAIM.

As the court of appeals held, "Neither the EEOC, nor Gnadt has cited any case so holding and we have found none." (A.7). This Court need not decide the issue of whether threats to interfere with future employment opportunities of a former employee may constitute retaliation as suggested by the Petitioner. As the court of appeals recognized, this issue was not properly before it. (A.6). The court of appeals' reasoning is quite simplistic: Gnadt failed to prove any harm to or effect on her resulting from Castro's threat. No effect upon or harm to an employee resulting from an employer's post employment activities can hardly undermine the remedial mechanisms of the anti-retaliation provision of Title VII as suggested by the Petitioner.

The "threat" cases relied upon by the Petitioner and by the EEOC in briefs to the court of appeals all suggest that the threat must result in an adverse employment action disadvantaging the employee. *See McKnight v. General Motors Corp.*, 908 F.2d 104 (7th Cir. 1990) (when employee failed to dismiss his discrimination claim he was reassigned to a trouble prone production line adversely affecting his performance evaluations); *Garcia v. Lawn*, 805 F.2d 1400 (9th Cir. 1986) (DEA threatened transfer of current employee from L.A. to Detroit in retaliation for exercising Title VII rights); *Holt v. Continental Group*, 708 F.2d 87 (2nd Cir. 1983), *cert denied*, 465 U.S. 1030 (1984) (current employee given adverse employment evaluation and discharged for exercising Title VII rights); *Ford v. Alfaro*, 785 F.2d 835 (9th Cir. 1986) (current employee physically assaulted and threatened on the job); *NLRB v. Overseas Motor, Inc.*, 721 F.2d 570 (6th Cir. 1983) (current employee threatened with undesirable assignments and suspended when filed charges with the Board); *Baker v. U.S. Dep't of the Interior Board of Mine Operations Appeals*, 595 F.2d 746 (D.C. Cir. 1978) (employer threatened current employees that their jobs would be in jeopardy if they testified at a deposition and employees were then discharged after the deposition); *Eastern Assoc. Coal v. Fed. Mine S. & H. Rev. Com'n*, 813 F.2d 639 (4th Cir. 1987) (miner discharged in retaliation for health and safety complaints filed under the Mine Safety and Health Act). *Atkinson v. Oliver T. Carr Co.*, 40 FEP cases (BNA) 1041 (D.D.C. 1986) (threat of filing criminal complaint unless plaintiff withdraw discriminating charges). This Petitioner suffered no such adverse employment action. In fact, this Petitioner did not suffer at all and the Court should deny her petition.

CONCLUSION

The district court's factual findings that the Petitioner suffered no harm or effect on herself from Castro's alleged threat is well supported by the record and clearly not erroneous. The Petitioner's claims failed for lack of evidence that Castro acted to interfere with her prospective employment opportunities or any other kinds of activities. Nominal damages are not to be awarded in cases of no injury. The petition for writ of certiorari should be denied.

Respectfully Submitted,

GREGORY BECKWITH
Counsel of Record
PHILLIPS, BECKWITH & HALL
Attorneys for Respondents
10513 Judicial Drive
Suite 100
Fairfax, Virginia 22030
(703) 691-4100

APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT DECIDED JULY 10, 1997

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 95-1369

MARY ANNA GNADT,

Plaintiff-Appellant,

v.

ERNEST G. CASTRO; CASTRO FAMILY, INCORPORATED, t/a Tino's Sports Lounge, t/a Mama's Italian Restaurant,

Defendants-Appellees.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Amicus Curiae.

On Remand from the United States Supreme Court.
(S. Ct. No. 95-1981)

Argued June 5, 1997

Decided: July 10, 1997

Before RUSSELL, HAMILTON, and MOTZ, Circuit Judges.

Affirmed by unpublished per curiam opinion.

Appendix A

* * *

OPINION

PER CURIAM:

We consider this case on remand from the Supreme Court. *See Gnadt v. Castro,* 117 S. Ct. 1077 (1997). The sole question now at issue is whether a former employee can prevail on a retaliation claim against a former employer without proving that the alleged retaliatory act had any effect on the employee. The district court held that an employee could not prevail on a retaliation claim in this circumstance, and we affirm.

In January 1992, while attending law school, Mary Anna Gnadt began working part-time as a waitress and bartender at Tino's Sports Lounge in Fairfax County, Virginia. By October 1993, Gnadt had established a work schedule that included bartending during the day on Sunday and on Monday nights, and waitressing on Wednesday nights. But during that month, Tino's hired a new employee, Michael Devine. To accommodate Devine's schedule, the manager of Tino's — Bernardo Terazzas — informed Gnadt on October 15, 1993 that her bartending duties would be switched to waitressing. When Gnadt asked Terazzas why she could not continue behind the bar while Devine acted as a waiter, Terazzas pondered that it was "too tacky to have a man as a cocktail waitress and a woman behind the bar." The shifted responsibilities would have reduced Gnadt's wages by about $2.00 an hour.

Unhappy with the reassignment, Gnadt attempted to contact Tino's owner, Ernest Castro, leaving messages at home and at work for him. On October 17, 1993, she reached him and

ascertained that although there were no problems with her performance, the reassignment was final. Upon learning this, Gnadt resigned from her employment at Tino's. Less than a month later, she filed a charge of gender discrimination with the Fairfax County Human Rights Commission, which forwarded the complaint to the Equal Employment Opportunity Commission (EEOC).

When he heard of the discrimination charge, Castro made repeated efforts to contact Gnadt by telephone. In a November 27, 1993 telephone call, Castro angrily demanded to know what Gnadt thought she was doing. Castro left messages on Gnadt's answering machine to which she did not respond. Gnadt then asked a lawyer, Martin Mooradian, for whom she worked part-time as a law clerk, to write Castro requesting that he leave her alone.

On December 2, 1993, Castro left a message on an answering machine at the home where Gnadt was housesitting, in which he said:

> If you want to pursue this . . . all I can tell you is I can fry you. . . . I can make life very miserable for you in this Northern Virginia area, especially in the legal field. I know a lot of lawyers and after I get through talking with them, your prospects for employment with any of them will be very, very, very slim.

Castro also telephoned Mooradian and told him that Castro knew "just about every attorney in Fairfax and he was going to tell every one of them that he knew [Gnadt] and about how unreliable and . . . disloyal she was as an employee so that she would never get another job as an attorney."

Mooradian testified that Gnadt's performance at the law firm suffered during the period when she received Castro's telephone calls; however, he could not rule out the possibility that other factors caused this decline in performance. Gnadt testified her entire social life was affected by the phone calls, that she was "scared to death" that Castro "would really try to sabotage [her] attempts to find employment in Fairfax," and that she thought Castro's message "indicated that he thought that he would be able to crucify me in court, so to speak." Gnadt did not submit any other evidence that the telephone calls affected her in any way. Moreover, Gnadt stated that she never sought assistance from a psychiatrist, psychologist, counselor or any sort of physical or mental therapy, or medication because of Castro's telephone calls. She acknowledged that she had no knowledge that Castro contacted any prospective employer or attempted in any way to obstruct her ability to obtain employment. She conceded that during and after the time she received the calls, she continued to attend law school and maintain her previous good grade average, to work part-time in the law firm, and to maintain her relationship with her boyfriend. Indeed, in response to an interrogatory request, Gnadt did not list a single activity of any kind that she was unable to perform as a result of Castro's telephone calls.

Gnadt amended her discrimination charge to add a retaliation claim and after the EEOC issued a right to sue letter, she filed suit in federal court against Castro, Castro Family, Inc., t/a Mama's Italian Restaurant and Tino's Sports Lounge. In addition to a state law claim for intentional infliction of emotional distress, Gnadt alleged that Castro violated 42 U.S.C. § 2000e-2(a)(1) (1994) and 42 U.S.C. § 1981a (1994) in discriminating against her on the basis of gender by altering her work schedule and decreasing her pay and constructively discharging her and that

he violated 42 U.S.C. § 2000e-3(a) (1994) and 42 U.S.C. § 1981a in retaliating against her for filing a discrimination charge.

The district court granted Castro judgment as a matter of law on all four counts at the conclusion of Gnadt's case. In ruling on the retaliation claim, the court assumed that a former employee, like Gnadt, could bring a retaliation claim under Title VII against a former employer. Gnadt appealed the entry of judgment against her on the gender discrimination and retaliation claims.

We vacated the district court's judgment as to the discrimination claim and remanded it for trial. *See Gnadt v. Castro,* 79 F.3d 1141 (4th Cir. 1996) (unpublished per curiam opinion). We held Gnadt's appeal on the retaliation claim was foreclosed by our decision in *Robinson v. Shell Oil Co.,* 70 F.3d 325, 330 (4th Cir. 1995) (en banc), in which we found former employees not entitled to the protection of Title VII. That decision was subsequently reversed by the Supreme Court. *See Robinson v. Shell Oil Co.,* 117 S. Ct. 843 (1997) (holding that "employees" under Title VII include coroner employees). The Supreme Court then granted certiorari and vacated and remanded our opinion in the case at hand so that we could reconsider it in light of *Robinson. See Gnadt v. Castro,* 117 S. Ct. 1077 (1997).

Because, as noted above, the district court tried the Title VII retaliation claim assuming that a former employee could bring such a claim against a former employer, both parties acknowledge that the Supreme Court's holding in *Robinson* does not have any effect on our review of this case.

Gnadt and the EEOC believe that this case does present the question of whether a former employer's "threats" of "adverse

action" alone, where the employer does not follow through on the threats, but the employee is otherwise affected by them, can be a basis for a retaliation claim. However, a close examination of the record reveals that not even this issue is properly before us.

The district court explained its rationale for entering judgment as a matter of law on the retaliation claim as follows:

> [W]hat the Court has to look at with retaliation is whether or not there is any evidence in the case that the defendant interfered with any prospective employment opportunities for the employee, and there is absolutely no evidence of that other than a threat by Mr. Castro to keep the plaintiff from ever getting a law job.
>
> [Gnadt], herself, admitted several times . . . that she had no evidence whatsoever that any phone calls, or any contacts, or any actions had been taken by the defendant to in any way interfere with prospective business, educational, or other kinds of activities. And therefore, I find no factual basis to support the plaintiffs case on the retaliation issue.

Thus, the district court did not just hold that Gnadt's retaliation claim failed for lack of evidence that Castro acted to interfere with Gnadt's prospective employment opportunities. Rather, the district court also found that Gnadt had not proved *any* harm to or even effect on her resulting from Castro's threat, i.e. no "interference" with Gnadt's "prospective business, educational, or any other kinds of activities." *See* Fed. R. Civ. P. 52(c) (district court's entry of judgment on partial findings

while conducting a bench trial must be supported by findings of fact and conclusions of law as required by Federal Rule of Civil Procedure 52(a)).

Of course, Gnadt did present her own testimony that Castro's threat affected her social life and "scared" her because she believed he would "sabotage" her efforts to find future employment and Mooradian's testimony that her performance at work suffered, which provide some evidence to the contrary. However, the district court by necessity found that, in view of Gnadt's numerous concessions as to lack of proof of any injury, this evidence was insufficient — that Gnadt had failed to demonstrate any harm to or even effect on herself from Castro's threats. As indicated in our summary of the facts above, clearly there was evidentiary support for this finding. *See* Fed. R. Civ. P. 52(a) ("Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given the opportunity of the trial court to judge of [sic] the credibility of the witnesses."). Indeed, on this record it would be impossible to find that Gnadt proved any measurable harm to or even effect on her resulting from Castro's threat.

In view of this well-supported factual finding, the only appellate argument available to Gnadt is that an employer's threats alone, which the employee is unable to prove had *any effect at all* on her, can constitute a basis for a Title VII retaliation claim. Neither EEOC nor Gnadt has cited any case so holding and we have found none. It is difficult to envision such a case in view of the fact that Title VII, as amended in 1991, permits the award of compensatory damages only for "future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other non-pecuniary losses," 42 U.S.C.

§ 1981a(b)(3), *not* for no loss at all. Even violation of a constitutional right does not entitle a plaintiff to compensatory damages without proof of injury. *See Memphis Community Sch. Dist. v. Stachura*, 477 U.S. 299, 308 (1986) ("Where no injury was present, no 'compensatory' damages could be awarded.").

For these reasons, the judgment of the district court is

AFFIRMED.

APPENDIX B — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT DENYING PETITION FOR REHEARING FILED AUGUST 5, 1997

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 95-1369
CA-94-897-A

MARY ANNA GNADT

Plaintiff - Appellant

v.

ERNEST G. CASTRO, CASTRO FAMILY, INCORPORATED, t/a Tino's Sports Lounge, t/a Mama's Italian Restaurant

Defendants - Appellees

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

Amicus Curiae

On Petition for Rehearing with Suggestion for Rehearing In Banc

The appellant's petition for rehearing and suggestion for rehearing in banc were submitted to this Court. As no member of this Court or the panel requested a poll on the suggestion for rehearing in banc, and

Appendix B

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

For the Court,

Clerk